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No. 10-48

In the Supreme Court of the United States

INTERIOR/EXTERIOR SPECIALIST COMPANY, THE LLAMAS GROUP CORPORATION, AND RITO JULIAN LLAMAS,
Petitioners,

v.

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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REPLY

The Fund never responded to the major concern set forth in the Petition – that the NLRB is rendered powerless if pension funds can ignore the terms of an NLRB settlement that resolves an unfair labor practice claim and amends the same CBA that the funds rely upon to collect fringe benefits. The Fund's lack of a response is telling: even the Fund must agree that the NLRB's impotence in settling labor disputes that affect fringe benefits is a significant concern. For this reason, this Court should grant the Petition.

I. Because the Settlement Agreement amended the CBA, the Fund was barred from suing IES and TLG.

The Painters Union filed a claim against union IES and nonunion TLG in the NLRB asserting alter ego. The resulting Settlement Agreement, sanctioned by the NLRB, amended IES's CBA by making nonunion TLG responsible for fringe benefits on painting work. Subsequently, the Respondent Fund sued IES and TLG for alter ego, breach of the CBA, and breach of the Settlement Agreement. The Fund alleged in its pleadings that "because of the settlement agreement ... TLG is bound by the provisions of the [CBA]." RE.29: ¶22. In doing so, the Fund acknowledged that (1) the Settlement Agreement amended the CBA, and (2) the Fund was a third party beneficiary of both agreements.[1]

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[1] In fact, the Fund did not prevail on its breach of the Settlement Agreement claim because IES and TLG fully complied with the Agreement.

When a union settles a dispute in the NLRB, the NLRB settlement is not an "undisclosed side agreement" that the Fund can disregard. (*See* Petition, p. 15, and cases cited therein.) Instead, as with all decisions of the NLRB, its settlements must be enforceable against third parties – especially third party beneficiaries of the very agreement that is called into question. So when the Painters Union reached a settlement of its alter ego claim against IES and TLG, the NLRB settled any dispute concerning the CBA and alter ego claims up to the date of the Agreement. The courts cannot re-open the settlement and change it to suit the pension fund. Such an absurd result would mean that the NLRB could never reach a settlement as to any part of a labor dispute involving a CBA; pension funds deriving their fringe benefits from that same CBA could simply ignore the NLRB proceedings and sue for enforcement of the original CBA (as the Respondent Fund did here).

It is undisputed that the Painters Union could not pursue an alter ego claim against TLG and IES after entering into the NLRB settlement. Similarly, the Painters Union's related fringe benefit funds must be precluded from suing IES and TLG for alter ego after the NLRB sanctioned a settlement of the same claim brought by the union. Otherwise, the NLRB is stripped of all its power to render decisions or approve settlements of labor disputes.

If the Sixth Circuit's decision stands, no union could ever settle a dispute concerning any aspect of a CBA – including disputes over an employer's duty to bargain in good faith, the termination date of a CBA, or alter ego liability – because the related pension and welfare benefit funds could simply revert to the CBA

as they interpret it, regardless of the NLRB's resolution. A pension fund could ignore the NLRB's interpretation and press its case in district court to interpret the CBA as it stood before any NLRB involvement. The opportunity for inconsistent results concerning identical CBAs and employers is simply too great. This Court has cautioned that the federal courts' enforcement of CBAs must be "fashion[ed] from the policy of our national labor laws." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 254 (1974) (quoting *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957)). When Congress enacted the labor laws, it certainly did not intend to permit pension and welfare benefit funds to circumvent resolutions reached in the NLRB.

Other than the court below, the Fund cites no NLRB or district court case where a union reached an NLRB settlement and a related pension or welfare benefit fund was permitted to ignore the NLRB's resolution in pursuing a collection claim in district court. If the Sixth Circuit's decision is permitted to stand, a pension fund could enforce an older version of a CBA even though the union and employer modified the contract through NLRB proceedings.

In 1959, this Court set forth the standard for judicial deference to the NLRB:

> When an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 245 (1959). The claim of alter ego status is an unfair labor practice claim, which falls within the exclusive jurisdiction of the NLRB. *See NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 578 (6th Cir. 1986) (Board's unfair labor practice charge of alter ego was violation of 29 U.S.C. §158(a)(5) and (1)). Otherwise, if courts are permitted to address alter ego claims brought by fringe benefit funds, inconsistent results will be reached, such as in the instant case.

> At times it has not been clear whether the particular activity ... was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.

Garmon, 359 U.S. at 244-45. The Painter's Union, recognizing the NLRB's exclusive authority, filed its claim for alter ego before the Board and not in federal court. Subsequent problems arose because the Fund filed the same alter ego unfair labor practice claim in federal court. As the NLRB has already resolved the alter ego claims against IES and TLG, courts cannot substitute their judgment for that of the NLRB and reach a different conclusion. The Complaint should have been dismissed.

Unfortunately, courts routinely permit fringe benefit funds to bring alter ego claims against employers. As such claims are actually unfair labor practice claims governed by §8 of the NLRA, 29 U.S.C.

§158, the unions should be the only parties permitted to bring such claims in the NLRB, not the funds suing for collection in the district courts. Otherwise, inconsistent results will be reached by the NLRB and the courts, as occurred here. The Petition should be granted to address this problem.

Respondent criticizes several district court decisions that explain why a union cannot circumvent its own settlement agreement. *See Cement Mason's Union Local No. 592 Pension Fund v. Zappone,* 501 F. Supp. 2d 714 (E.D. Penn. 2007), and *Rhode Island Carpenters Annuity Fund v. Trevi Icos Corp.,* 533 F. Supp. 2d 246 (D.R.I. 2008). In *Trevi Icos*, the court found that the fund was improperly pursuing claims against an employer at the union's behest. A union cannot skirt its own settlement agreement in the NLRB by convincing its related pension fund to re-sue an employer using identical allegations as those that the union just settled. The Respondent Fund has cited no case in which a pension fund was permitted to sue in federal court on an identical theory that the union previously settled in the NLRB.

Other cases cited by the Fund do not support its position. (*See* Oppo. Brief at 14-16.) In *Southwest Administrators, Inc. v. Rozay's Transfer,* 791 F.2d 769 (9th Cir. 1986), the Ninth Circuit found that a trust fund was not bound by an undisclosed oral "side agreement" between the union and the employer to forgive collection of fringe benefits for a nine-month period in the middle of the three-year CBA. The *Rozay's Transfer* settlement stated that it resolved all disputes between the parties arising out of an alleged unfair labor practice, but made no reference to trust fund contributions. *Id.* at 775. It also made no

reference to the oral side agreement to forgive nine months of fringe benefit obligations. The CBA executed simultaneously with the settlement expressly required contributions to the trust fund, including during the nine-month period that the union excused. *Id.*

In the instant matter, the NLRB Settlement Agreement required nonunion TLG to comply with the subcontracting provision of the CBA, thus amending the CBA and extending its reach to a nonunion company. In contrast to the NLRB settlement in *Rozay's Transfer*, the Settlement Agreement in the instant matter referenced both the Union's NLRB alter ego claim and the Fund's 2004 lawsuit seeking a comprehensive audit. The Fund was informed about and acquiesced to the Settlement Agreement and its terms, and the Fund even referred to the Agreement in the dismissal order for the 2004 lawsuit. Thus, the Settlement Agreement differs from the *Rozay's Transfer* settlement in two key components: (1) the Fund specifically acquiesced to it, even dismissing its own suit in reliance upon it, and (2) it modifies trust fund contribution requirements. RE.86-15. As such, the third party beneficiary Fund can be held to its terms. This Court should grant this Petition to correct the misperception that *Rozay's Transfer* stands for the proposition that the NLRB is powerless to interpret CBAs and that no pension fund can be bound to an NLRB resolution of a dispute concerning a specific CBA and a specific employer.

Respondent also cites the decision in *Bakery & Confectionery Union v. United Baking Co.*, 495 F. Supp. 170 (W.D. Pa. 1980), which is inapposite to the instant matter. The *United Baking Co.* settlement

specifically excluded any pension obligations; otherwise, the fund would have been bound by it and precluded from suit. In contrast, the instant Settlement Agreement settled pension fund obligations and required TLG to pay fringes in the event that it hired any nonunion painters after its execution. RE.86-15: ¶5.

Unfortunately, the Painters Union directed the Respondent Fund to pursue an alter ego claim against IES and TLG after the Settlement Agreement was executed. Robert Kennedy, who headed the Union, testified that he became angry upon realizing that the Settlement Agreement did not require IES to remain in the Union, so he instructed the Fund to seek a comprehensive audit of IES and TLG in order to recover for alter ego. App. 48a-49a. The Fund (half of whose Trustees are union signatory competitors of IES) is forbidden from ordering comprehensive audits without a Union request. App. 49a. Thus, the Fund never could have sought a comprehensive audit and sued IES and TLG unless the Union directed it to do so.

The Ninth Circuit reached its decision in *Southern California Retail Clerks Union v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984), cited by Respondent, because Congress sought to prevent the conversion of "simple collection actions ... into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions." *Id.* at 1265 (citing Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076-The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 44 (Comm. Print 1980)). Because the

NLRB Settlement Agreement sets forth the Fund's entitlement to contributions from TLG, it is directly relevant to the instant matter and should serve as a bar to the Fund's lawsuit.

II. The Sixth Circuit eliminated the "disguised continuance" standard set forth in *Southport Petroleum*.

Alter ego is a question of fact, but is based on a legal standard that varies from Circuit to Circuit. Even the Respondent disputes the district court's findings of fact and conclusions concerning the seven alter ego factors in this case. (*See* references throughout Oppo. Brief to facts beyond district court's opinion, RE.136.) The question for this Court is whether the Sixth Circuit can materially change the alter ego test to require only that two companies have some "similarity" in operations.[2] For it is undisputed that the district court below found that IES and TLG had separate equipment, management, ownership, and business purposes (App. 62a-63a), and only some similarity in customers (App. 64a), and supervision (because even though TLG had separate paid supervisors, Julian Llamas occasionally supervised TLG projects). (App. 63a) In upholding the district court, the Sixth Circuit's alter ego test no longer requires "substantial identicality" of the seven factors, but instead "some similarity" as to just a single factor, thus eliminating the disguised continuance

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[2] This reasoning would permit a court to find that two companies are alter egos if they have "some similarity" as to one factor. Under such reasoning, the U.S. Postal Service and McDonald's, which serve virtually every American, could be found alter egos because they have "some similarity" in their customer bases.

requirement. This Court should grant the Petition to reassert the disguised continuance rule as set forth in *Southport Petroleum v. NLRB*, 315 U.S. 100 (1942), and its progeny.

A. The alter ego test varies from Circuit to Circuit.

Contrary to the Fund's assertion, the Circuits do not consistently apply the same alter ego test as that used in the Sixth Circuit. Specifically, courts in the First, Fourth, Seventh, Ninth and Tenth Circuits do not use the NLRB rule or the seven-factor test. *See Mass. Carpenters Cent. Coll. Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 21-22 (1st Cir. 2003) (First Circuit equity standard denies recovery to pension funds when no corporate change causes union to be in worse position); *Alkire v. NLRB*, 716 F.2d 1014, 1021 (4th Cir. 1983) (Fourth Circuit "reasonably foreseeable benefit" standard finds alter ego if employer obtains economic benefit at expense of statutory employee rights); *Trs. of Pension, Welfare & Vacation Fringe Benefit Funds v. Favia Elec. Co.*, 995 F.2d 785, 787 (7th Cir. 1993) (Seventh Circuit requires proof of unlawful evasion before assessing alter ego liability, and then uses five factor test); *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982) (Ninth Circuit uses four factor alter ego test); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470 (9th Cir. 1995) (Ninth Circuit evaluates whether nonunion entity is used in sham effort to avoid labor obligations rather than for legitimate business objectives); *NLRB v. Tricor Prods., Inc.*, 636 F.2d 266, 270 (10th Cir. 1980) (Tenth Circuit declares there is no hard and fast rule for determining alter ego).

However, these Circuits also struggle with adherence to the "disguised continuance" rule set forth by this Court in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). While each Circuit has different alter ego standards and tests, they have one thing in common: no other Circuit uses the Sixth Circuit's "any similarity" test. The Petition should be granted so that this Court can provide uniformity in the federal labor laws.

B. The labor laws are applied inconsistently.

Because the Circuits use a wide range of tests for alter ego, the federal labor laws are not being enforced consistently across the country. Alter ego liability largely depends on what Circuit the employer happens to do business inside. Indeed, if the facts of the instant case were analyzed in another Circuit, no alter ego liability would have been assessed.

In addition to the variety of tests used, courts do not know how to balance the factors they are considering. Many courts using either four-factor or seven-factor tests have pronounced that all factors do not need to be present and none are controlling. *Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172 (3d Cir.), *cert denied*, 552 U.S 818 (2007); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986); *Trs. of Pension, Welfare & Vacation Fringe Benefit Funds v. Favia Elec. Co.*, 995 F.2d 785 (7th Cir. 1993), *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *Flynn v. R.C. Tile*, 353 F.3d 953, 958 (D.C. Cir. 2004). Rarely does a court know how to balance the factors that it considers. One exception is the district court in *Sheet Metal Workers International Ass'n v. Todd-Ford Management Co.*, No. SA-03-CA-

290-XR, 2006 WL 1044240 (W.D. Tex. Mar. 9, 2006). The *Todd-Ford* court considered whether each alter ego factor was met under the "substantial identicality" test, and concluded that, on balance, alter ego was inappropriate even though the two companies had substantially identical operations, customers and ownership. *Id.* at *13-*15. Petitioners would not be alter egos in that court.

Moreover, many courts ignore the question of whether the union or pension fund has sustained any harm from the transaction or transfer of assets. In fact, if no fringe benefits were unlawfully evaded, no alter ego liability can result. Absent evasion of labor obligations, there can be no "disguised continuance" or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.

III. The Sixth Circuit effectively declared double-breasting illegal.

Contrary to the Fund's argument (Oppo. Brief, 20), the effect of the Sixth Circuit's decision is to declare double-breasting illegal within this Circuit. Double-breasted operations, in which the same owners conduct business through both a union company and a nonunion company, are no longer possible in the Sixth Circuit. Even though the CBA at issue did not forbid the owner of a signatory from also owning a nonunion company, this decision permits an alter ego finding if the two companies have "some similarity" as to one of the seven factors, including any similar ownership, management or supervision. Under the new "some similarity" test, no entities could ever operate legally as double-breasted. As such, the Sixth Circuit has

done what Congress refused to do – declared double-breasting illegal.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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